

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATE OF AMERICA,

- against -

VICTOR DIAZ,

Defendant.  
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**AFFIRMATION**  
S4 07 CR 387 (CLB)

Michael K. Burke, Esq., being duly sworn, deposes and makes the following statements:

1. I am an attorney at law admitted to practice in the State of New York and in the United States District Court for the Southern District of New York. I am a member of the firm of Burke, Miele & Golden, LLP, the attorneys appointed to represent the defendant, Victor Diaz, in the within matter, and as such, I am fully familiar with the facts of this case.

2. This affidavit is made upon information and belief, in support of the within motion whereby the defendant, Victor Diaz, seeks orders of this Court granting specific and varied relief as set forth in the annexed Notice of Motion.

3. Victor Diaz is charged in Indictment No. S4 07 CR 387 (CLB) with Conspiracy to Kidnap (Count One), Kidnapping (Count Two), Conspiracy to Commit an Armed Robbery (Court Four) and Armed Robbery (Count Five).

4. The defendant, Victor Diaz, was arraigned on these charges before Magistrate Judge Lisa Smith on November 20, 2007. He has been detained without bail since that time. This matter was assigned to the Honorable Charles L. Brieant, U.S.D.J., for further proceedings.

5. Victor Diaz will be severely prejudiced if he is tried jointly under this indictment with his co-defendants. The Government has charged several violent offenses against the other co-

defendants, which have nothing to do with Victor Diaz. The indictment alleges that additional kidnappings and robberies by other co-defendants have been committed in this case and that firearms have been possessed and used by other co-defendants during those offenses. The Government's proof as to those counts of the indictment, if allowed to occur during a joint trial, will certainly prejudice Victor Diaz as a result of the inescapable "spillover effect" such evidence will create at a joint trial. Victor Diaz's alleged involvement in this case is limited to a September 13, 2006 incident involving a truck hijacking.<sup>1</sup> The actual prejudicial effect that such a presentation will have on Victor Diaz's rights to a fair trial by jury cannot be minimized, nor can any Court instruction or admonishment guarantee that the jury will separate evidence that is relevant as to each defendant, and consider it separately, as required by law.

6. The Government in pretrial disclosure has notified the defense of prior out-of-court photographic identifications in this case. Two individuals have been shown a photographic array and have identified Victor Diaz. The Government has also informed the defense that none of the alleged "victims" of these robberies have identified Victor Diaz. These identifications procedures were conducted in a fashion which was "impermissively suggestive" and are likely to give rise to a very substantial likelihood of "irreparable misidentification."

The Government has not disclosed any alleged statements of co-defendants in this case. Therefore, it is impossible for the defense at this time to be aware of any issues which might arise pursuant to *Bruton v. United States*, 391 U.S. 123 (1968), if any such statements should inculcate the defendant, Victor Diaz.

7. The information and relief sought in the defendant's requests to this Court are necessary to determine defense strategy and to adequately prepare for trial. The defense will be

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<sup>1</sup> Overt act found in paragraph 3(c) of superseding indictment S4 0 CR 387 names Victor Diaz but is not a charged offense in the indictment as it is alleged to not have occurred in this jurisdiction.

severely handicapped if this requested information and relief is not provided. No previous application for the relief sought herein has been made at any prior proceeding.

8. The accompanying Memorandum of Law, which is hereby incorporated and made part hereof, further elaborates on the information and relief sought by this defendant and the arguments which support his applications.

Dated: February 7, 2008  
Goshen, New York

Yours, etc.

  
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